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IN THE

Supreme Court of the United States

October Term, 1957

No. 529

WILLIAM KELLY,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court undertake to interpret a state statute which is of no national significance and which the courts of the state have refused to give the interpretation now urged by petitioner?

2. Should a Pennsylvania statute passed in 1851 be interpreted to forbid a common carrier from performing a service required by the Interstate Commerce Act passed in 1906 and by Pennsylvania statutes passed in 1913 and 1937?

STATEMENT OF THE CASE

On March 1, 1949 the petitioner, a laborer hired and paid by the General Electric Company (General Electric) as a maintenance worker along the tracks of its industrial siding (44a, 53a, 54a, 20a, 43a, 90a, 115a-116a), was struck by a shifting engine built, owned and maintained by General Electric (6a-7a, 93a, 94a, 96a, 142a). The engine was operated by a General Electric engineman (6a, 24a, 135a), was manned by a General Electric crew (15a, 89a, 69a, 133a), and was in the process of making a shifting movement on tracks owned, operated and maintained by General Electric (13a, 16a, 33a, 40a-41a, 132a-134a, 135a, Defendant's Exhibit 3, 181a-189a). The movement was being made under directions of a General Electric yardmaster (130a, 136a) in the course of one of the numerous shifts of railroad cars made daily by General Electric within its own yard and buildings (93a, 133a). The accident occurred on General Electric property at a General Electric switch, which plaintiff was repairing at the express direction of a General Electric employee (48a-49a, 69a, 85a-87a, 133a).

Petitioner's medical expenses and other compensation were paid by General Electric under the Pennsylvania Workmen's Compensation Act (70a, 71a). Attempting to recover other benefits if he could, he brought two actions under the Federal Employers' Liability Act.[1] In the first he claimed that the General Electric's plant railway made that company a common carrier and that General Electric, his admitted employer, was hence liable to him under the FELA. He lost that suit when it was held that General Electric's plant facility did *not* make it a common carrier. *Kelly v. General Electric Co.*, 110 F. Supp. 4 (E. D. Pa.), *aff'd per curiam*, 204 F. 2d 692 (3rd Cir.), *cert. denied*, 346 U. S. 886 (1953). He then pursued the present case

1. 35 Stat. 65 (1908), as amended, 53 Stat. 1404 (1939), 45 U. S. C. A. § 51 *et seq.* (1952).

which he brought against The Pennsylvania Railroad Company (Railroad) in an attempt to establish a master-servant relationship with it. In the Court of Appeals he claimed for the first time that such a relationship arose because connecting General Electric's tracks to the Railroad's was forbidden by Pennsylvania law and that General Electric was therefore the Railroad's agent.

The Railroad had nothing to do with General Electric other than to furnish it routine interchange service, just as it would any industry with switch connections to its tracks. Starting about 1925, when trackage was laid in West Philadelphia to connect the General Electric plant tracks with the Railroad's main line tracks (Defendant's Exhibit 3, 181a-189a), and continuing up until the day of the accident, the Railroad had daily delivered inbound cars, both loaded and empty, to the General Electric interchange tracks, the point at which it was agreed that deliveries of cars both to General Electric and to the Railroad should be made, and had removed outbound cars from the interchange, a procedure taking roughly ten minutes (28a, 30a-31a; 65a-68a; 77a, 93a-94a, 138a-139a, 140a). Under the regulations of the Interstate Commerce Commission an industry is entitled to one placement of cars per day (124a), and there is a tariff charge for every intra-plant shifting move which an industry thereafter requests a railroad to make (120a). Since the cost to General Electric would have been prohibitive if the Railroad made the twenty to twenty-five shifting moves required daily by General Electric in and around its plant, and since there would not have been adequate flexibility for the industry's needs if it relied on the Railroad for such moves (99a, 123a, 133a), General Electric operated its own plant railway, which, at the time of the accident, contained approximately two and one-quarter miles of trackage (89a). Its two diesel engines, which operated entirely within the confines of the plant railway and the interchange tracks, removed inbound cars from the interchange, delivered outbound cars to the

interchange, and made the numerous movements of cars around the General Electric yard that the industry required for its own purposes (37a, 41a, 88a-89a, 131a).

Like other large industries [2] General Electric conducted its plant railway under the auspices of the Pennsylvania Department of Labor and Industry and in accordance with State regulations (89a-90a, 108a, 115a-116a). It was operated exclusively under the direction and control of its own supervisors, just as the Railroad crews who serviced the plant for ten minutes each day did so under the sole supervision of the Railroad conductor (29a-32a, 40a, 68a, 88a, 93a-94a, 97a, 103a-104a, 108a-109a, 130a-131a, 134a-135a, 136a-138a, 140a-141a).

The Railroad's motion for summary judgment was denied by Judge Ganey of the Eastern District of Pennsylvania who said, ". . . it is difficult to see how the plaintiff can sustain the position that he was employed by the defendant. Nevertheless . . . no matter how dim his position on that issue may now appear, he must be given the chance to prove his allegations before a fact finding body." (Appellant's Appendix, 3rd Cir., 5a).

At the trial petitioner failed to establish any facts to suggest that he was a "borrowed servant" or other agent of the Railroad, and in his petition for certiorari he admits there is "no material dispute concerning the facts" (Petition pp. 3-4). The jury decided in his favor after receiving from Judge Welsh, since retired, what the Court of Appeals called a "patently erroneous charge" (245 F. 2d 409, Petition p. 2a) that they should decide whether Congress meant the FELA to cover men employed by industries on plant railways as well as those employed by common carriers (152a-153a, 156a-159a).

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2. The General Electric plant railway, with its independently-owned diesel engines, is similar to that of about eight other industries in the Philadelphia area (120a). However, there are in the Philadelphia area alone between 1,000 and 1,100 industries with railroad sidings upon which industry personnel, by one means or another, move railroad cars (123a).

The Court of Appeals decided that under the "test for employment of one person by another" the undisputed facts showed that petitioner was *not* an employee of the Railroad, and accordingly ordered the entry of judgment for the defendant (245 F. 2d 408, Petition pp. 1a-6a).

Petitioner does not question that the Court of Appeals correctly applied to the facts of this case the generally accepted test concerning employment (Petition p. 17). His sole reason for asking this Court to consider the case is his claim that the Court of Appeals was wrong in holding that the employment question before them was not affected by an obscure Pennsylvania statute, which had nothing whatever to do with employment, which has been on the books for over one hundred years but which has never been applied or interpreted by the Pennsylvania appellate courts, and which would conflict both with the Pennsylvania Public Utility Law [3] and with the Interstate Commerce Act [4] if given the meaning petitioner would have this Court give it.

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3. Act of May 28, 1937, P. L. 1053, art. IV, § 406, 66 P. S. § 1176.

4. Act of June 29, 1906, c. 3591, 34 Stat. 585, as amended, 49 U. S. C. A. § 1(9).

ARGUMENT

I. The Petition Raises No Question Which Warrants Review by This Court.

This case presents no reason which justifies the grant of a writ of certiorari. SUPREME COURT RULE 19(b). Petitioner recognizes the principle that men employed by industries on plant railways are not within the coverage of the Federal Employers' Liability Act. *Docheney v. Pennsylvania R. R.*, 60 F. 2d 808 (3rd Cir.), *cert. denied*, 287 U. S. 665 (1932); *Shaw v. Monessen Southwestern Ry.*, 200 F. 2d 841 (3rd Cir. 1953); *DelVecchio v. Pennsylvania R. R.*, 233 F. 2d 2 (3rd Cir.), *cert. denied*, 352 U. S. 909 (1956). See also article by petitioner's counsel recommending legislation to change this situation, Richter and Forer, "Proposed Changes in the Laws Governing Injuries in Interstate Transportation", 67 *Harv. L. Rev.* 1003, 1009 (1953). However, in order to create a special exception for industrial employes in Pennsylvania, petitioner asks this court (1) to put an interpretation on the Pennsylvania State Constitution and an ancient Pennsylvania statute that has never been suggested by a Pennsylvania court, (2) to conclude from that interpretation that employes of industries maintaining plant railways in Pennsylvania are employes of the connecting common carriers serving the industries which employ them, and finally (3) to apply this newly found doctrine of Pennsylvania law so that petitioner may recover under a federal statute.

Petitioner's legal position is clearly fallacious, and the points he makes are little more than a confusing rehash of those he made some years ago in his unsuccessful attempt to have the federal courts hold directly that General Electric was a common carrier and hence subject to the FELA. *Kelly v. General Electric Co.*, 110 F. Supp. 4 (E. D. Pa.), *aff'd per curiam*, 204 F. 2d 692 (3rd Cir), *cert. denied*, 346

U. S. 886 (1953).[5] It is neither necessary nor fitting that this Court be burdened with the tedious undertaking of unraveling the confusion of the petition. SUPREME COURT RULE 23(4). The arguments it contains have been considered by an able Court of Appeals which did not "find them helpful in clarifying the case" (245 F. 2d 410, Petition p. 4a). They raise no federal question at all, and the State question suggested, whether an 1851 Pennsylvania statute [6] forbade an industrial railway to connect its tracks with those of a common carrier, is purely academic. Whatever significance the statute may have had a century ago, today the Pennsylvania Public Utility Law [7] and the Interstate Commerce Act [8] fully cover the rights and obligations of industries and common carriers with respect to switch connections. For these reasons alone the petition for certiorari should be denied. SUPREME COURT RULE 19(b).

5. For instance, throughout his petition he constantly refers to General Electric as operating a "railroad" "in interstate commerce" and time and again he suggests that the shifting of cars by General Electric crews with General Electric equipment is something "only a common carrier could properly be performing . . ." (Petition p. 20; see also pp. 4, 5-6, 7, 11, 14, 18, 19, 24, 25 and 26.) That in turn leads him to label the General Electric plant railway an "unfranchised railroad" performing the Railroad's "non-delegable franchise duties". (Petition pp. 14 and 11; see also pp. 4, 7, 9, 12, 13, 17, 18, 19, 20, 24, 25, 26, 27.) However the earlier case established that the General Electric railway is a plant facility and *not* a common carrier and that it performs its own work solely for its own convenience, *not* the Railroad's (110 F. Supp. 8; and see the Opinion of the Court of Appeals in the present case, 245 F. 2d 410, Petition p. 5a).

6. Act of April 15, 1851, P. L. [1852] 720, § 7, 67 P. S. § 303. Petitioner says that this act "made explicit" a provision implied by the Pennsylvania Constitution "that any railroad company *not* incorporated as a common carrier railroad shall *not* have the right to connect with common carrier railroads." (Petition p. 12—Emphasis petitioner's.) The State Constitution neither says nor implies what petitioner claims it does. Most certainly its meaning was not "made explicit" by an act of the Legislature passed in 1851. The Constitution was enacted in 1874.

7. Cited in footnote 3, *supra*.

8. Cited in footnote 4, *supra*.

II. The Premise for Petitioner's Position Is Unsound.

It is unnecessary to consider each of the untenable points petitioner has made, for the fundamental premise upon which he rests his theory is unsound. Skipping over the fact that General Electric is not a railroad company and is under no obligation whatever to secure a franchise to operate its intra-plant facilities, any more than it would be if it shifted the cars within its plants by hand, by cable and winch, by truck, by bulldozer or by gravity, he says that the Pennsylvania Act of April 15, 1851, P. L. [1852] 720, § 7, 67 P. S. § 363, makes unlawful the switch connection between the Railroad's tracks and General Electric's because General Electric had no "common carrier railroad franchise from the Commonwealth." (Petition pp. 9, 12, 13, 16, 20, 25). As we told the Court of Appeals it is difficult to understand what the statute means. The reasons for its enactment are obscure (it was tacked onto the act "To Incorporate the Susquehanna and Erie Railroad Company"). Since its enactment in 1851 we know of no proceeding against any person or company for violating it, we know of no forfeiture directed by the Legislature under its provisions,[9] and we know of no judicial interpretation which adopts petitioner's views concerning its meaning. The statute has apparently been considered by a Pennsylvania appellate court on only one occasion. In *Corey v. Edgewood Boro.*, 18 Pa. Super. 216 (1901), A wanted to get rid of a railroad B had built on B's land. An attempt to have the railroad declared a nuisance was unsuccessful. It was then argued that the switch connection with the Pennsylvania Railroad was illegal under the 1851 statute and that the court should therefore approve eliminating the operation. The court was unwilling to interpret the statute as forbidding the switch connection, saying at p. 226, "We do not say that the owners of this way had no

9. Violation of the act was punishable by "such forfeiture as the legislature may hereafter direct."

right to connect their railroad with the Pennsylvania Railroad." The court also held that even if the statute were construed to make the connection illegal, that would apply only to the switch connection and not to the operation of the railroad as such. Therefore A was in no position to raise the question. We believe that this is the only appellate case in which the question of interpreting this obscure statute has been raised, but no court, state or federal, has suggested that this statute retained any operative significance after the passage of the Interstate Commerce Act in 1906 and the Pennsylvania Public Service Company Law in 1913.[10] In short, whatever its original purpose, the statute has long since become ineffective and is of no significance whatever in Pennsylvania today.

There is no point in attempting to interpret this old, ambiguous statute, for one thing is certain. The statute does not mean what the petitioner says it does. Contrary to his assertions, it is not unlawful for a railroad company to supply a switch connection for an industrial siding or railway like General Electric's. The present Pennsylvania Public Utility Law[11] *requires* railroads to make such connections. The Interstate Commerce Act[12] likewise *requires* such connections.

Recognizing that the Court of Appeals was correct in deciding that an interpretation of the 1851 statute which conflicted with the Pennsylvania Public Utility Law and the Interstate Commerce Act could not be sustained (245 F. 2d 410, Petition pp. 4a-5a), petitioner adopts a remarkable approach to avoid that Court's decision. Without the citation of a single case and without so much as a reference to the wording of the statutes, he says that the Pennsylvania Public Utility Law and the Interstate Commerce Act

10. Act of July 26, 1913, P. L. 1374, art. II, § 1(o), the forerunner of the present Public Utility Law cited in footnote 3, *supra*.

11. Cited in footnote 3, *supra*.

12. Cited in footnote 4, *supra*.

"merely require common carrier railroads to construct, maintain and operate switch connections with commercial sidings, that is, shippers' side tracks", and seems to conclude that the Act of 1851 prohibits such a connection if the industry uses engines of its own to move cars on its own trackage instead of moving them by hand, by tractor, by truck, by cable and winch or by bulldozer. (Petition pp. 13, 14). Such a distinction is being suggested here for the first time and there is nothing in the wording of the statutes to support it. Petitioner would agree that the Interstate Commerce Act and the Pennsylvania Utility Law require connections to be made with "sidetracks" and "lateral railroad tracks" but only if the industry itself moves no engines on them. (Petition pp. 13, 14). However, the Interstate Commerce Act covers switch connections between common carriers and any "lateral, branch line of railroad or private side track . . ." 49 U. S. C. A. § 1(9), and The Pennsylvania Public Utility Law requires such connections with "any lateral railroad or any private sidetrack," 66 P. S. § 1176, as did the 1913 forerunner of that statute, the Pennsylvania Public Service Company Law.[13] The statutes all refer to "railroads" and none even remotely suggests the limitation the petitioner professes to find from the Act of 1851.

However the Act of 1851 cannot limit in any way the broad scope of the Pennsylvania Public Utility Law or the Interstate Commerce Act and it therefore cannot have the effect petitioner ascribes to it. No responsible person in Pennsylvania has ever suggested that the Act of 1851 had any bearing on the connection of railroads with plant facilities such as General Electric's. On the contrary the operation of such facilities is recognized as lawful, and the record in this case shows that the General Electric plant railway is operated in accordance with the regulations issued by the Pennsylvania Department of Labor and Industry for indus-

13. Cited in footnote 10, *supra*.

trial railways (89a-90a, 108a, 115a-116a). Thus the State regulates such railways but does so without reference to the Act of 1851.[14]

Not only does the Department of Labor and Industry recognize the propriety of the operation of plant railways such as General Electric's, but also no one has ever sought to prevent it or to restrain the connection of such railways with operating railroads. On the only reported occasion on which such a connection was questioned, *Corey v. Edgewood Boro.*, 18 Pa. Super. 216 (1901), *supra*, the court refused to accept the construction now suggested by petitioner, saying (p. 226), "We have not deemed it necessary to put a construction on the section of the Act of 1851 called to our attention." But in addition the court stated clearly (p. 225), that even if the "connecting" were forbidden, that would not have the effect of making the operation of the railroad itself unlawful.

Petitioner's whole argument is based upon the premise that the operation by General Electric of its plant facility became "forbidden railroad business" because the Act of 1851 made unlawful the connection between General Electric's tracks and the Railroad's tracks. That connection was made in about 1925 (181a) at a time when both the Interstate Commerce Act and the Pennsylvania Public Service Law required it. Thus petitioner's fundamental premise is unsound and in conflict not only with existing statutory law, both State and federal, but also with the only Pennsylvania case on the subject. It is not necessary, therefore, to consider the untenable conclusion he draws from

14. Since petitioner did not mention the 1851 statute until he reached the Court of Appeals, over five years after the suit was brought, the record at trial does not contain evidence as to the number of plant railways throughout Pennsylvania similar to General Electric's. However the Court may take judicial notice of the fact that they are very numerous and have developed to complement the growth of the country's heavy industry. There are eight plant railways comparable to General Electric's in the Philadelphia area alone (120a).

his premise, namely that an unlawful switch connection turned General Electric into the Railroad's agent. See *Cleveland, Cincinnati, Chicago & St. Louis Ry. v. U. S.*, 275 U. S. 404, 413-4 (1928), in which arguments somewhat similar to petitioner's were held to have no substance.

CONCLUSION

Nothing distinguishes the General Electric plant railway from the thousands of other plant facilities throughout the country. Petitioner's reason for suggesting that coverage of the Federal Employers' Liability Act should be extended to employes of private industrial railways in Pennsylvania is based upon such a thoroughly unjustified interpretation of a State statute that it does not warrant consideration by this Court. The disposition by the Court of Appeals of the question petitioner raises was so clearly correct that nothing further is required.

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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